No. 33721-9-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

ZACHARY J. BIGGS, Appellant.

BRIEF OF RESPONDENT

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3. SHOULD THIS COURT REMAND FOR CONSIDERATION OF THE IMPOSITION OF FINANCIAL OBLIGATIONS?

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3. THIS COURT SHOULD REFUSE TO REMAND FOR CONSIDERATION OF THE IMPOSITION OF FINANCIAL OBLIGATIONS WHERE NO OBJECTION WAS MADE BELOW TO THE IMPOSITION THEREOF AND ONLY TWO ASSESSMENTS REQUIRED SPECIFIC INQUIRY INTO ABILITY TO PAY.

III. STATEMENT OF THE CASE

In December of 2013, the Appellant, Zachary J. Biggs, and Stacey Biggs were at that time married but separated. Report of Proceedings (RP) 178. Stacey[1] had become alarmed by the Appellant's behavior and periodic violence toward her. RP 179-180. Stacey and the Appellant had children together and she tried to make things work. RP 180. Ultimately, due to the Appellant's escalating behavior, Stacey filed for divorce and sought a protection order. RP 183-184. The order precluded the Appellant from having any contact with Stacey. RP 184.

Prior to this incident, Stacey had seen the Appellant at a gas station and he was cordial to her. RP 185-186. During this contact, Stacey was told that the Appellant's mother was very sick and wanted to see the grandchildren. RP 186. Stacey later went to the Appellant's mother's house, where the Appellant also lived, and found his mother to be in much better health than was reported. RP 189. While there, Stacey noticed that there wasn't much food in the house and later decided to take some food items over to them. RP 189.

On December 10, 2013, at around 8:00 p.m., Stacey came to the house with a box of food. RP 190. She approached the back

[1]To avoid confusion, this brief will refer to her by her first name and intends no disrespect.

door[2] and the Appellant observed her coming. RP 190. The Appellant opened the door and when she entered the house, he asked her what she was doing and whether the children were with her. RP 191. When Stacey told him that the children were not with her, he grabbed her around the neck and threw her to the ground. RP 191. He then forced her into his room and shut and locked the door behind them. RP 191. The Appellant threw her on the bed and demanded that she be silent. RP 191-192. He held her down on the bed with his forearm across her neck and pulled out a machete, menacing her. RP 192-193.

Stacey began pleading with the Appellant, asking him why he was doing this to her and asking that he let her go home to the children. RP 194. The Appellant began threatening to kill her and told her he would hide her body and take the children. RP 194.

At some point, the Appellant then claimed that people in masks were impersonating other people and he began pulling and pushing on the skin of Stacey's face. RP 196-197. He claimed to have seen her on the internet performing fellatio on other men. RP 197. The Appellant then grabbed a large sharpening stone and began threatening to bash her head with it if she didn't cooperate. RP 201. The Appellant then forced her to perform fellatio on him, grabbing her

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[2]This appears to have been the traditional entrance used by friends and family at the Biggs' home. RP 190.

hair and forcing her mouth onto his penis. RP 202. The Appellant held her there forcefully, causing her to nearly vomit. RP 202.

He then pushed her onto the floor and told her she was going to "make love to [him] like [his] wife" or he would stab her. RP 203. The Appellant began vaginally raping Stacey on the floor. RP 203. He became dissatisfied with her performance and reached for the machete which he had earlier placed on the bed. RP 203-204. Stacey begged him and gave him an excuse. RP 204. She told the Appellant that her back was hurting from a previous car wreck and that the hard floor was hurting her. RP 204. The Appellant began threatening to cut her up with the machete and Stacey told him that he was scaring her and asked him to put it away. RP 204. He then put the machete into a chair but kept the sharpening stone in his hand. RP 204.

The Appellant then allowed her to get up onto the bed. RP 204. He proceeded to again vaginally rape her on the bed. RP 204-205. The entirety of the attack occurred over a three hour period as she was not able to leave until approximately 11:30 p.m. RP 206. Stacey testified that she was terrified the entire time and believed that she was not going to be allowed to leave the room alive. RP 205.

The Appellant eventually stopped and allowed her to get dressed. RP 205. The Appellant then insisted that she take him to the store to get him a cigar which she agreed to do. RP 206, 208. He

told her that she was going to do whatever he told her to. RP 209. He then told her he would kill her if she told anyone. RP 209. The Appellant looked at his arm as if he were looking at his watch and told her,

> Yeah, about this time tomorrow I'll probably be in jail. And that's all right; I'll do my time. 'Cause when I get out I'll come find you, I'll sneak in the middle of the night and I'll slice your throat. Or I'll come out to your work, wait for you to get off and run your ass and your car into the river and I'll kill you.

RP 209-210.

Stacey did not make a report this incident to the police until co-workers saw that she was upset the next day at work. RP 213, 214-15. When she confided in her co-workers, they called the local law enforcement who, in turn, contacted the Asotin County Sheriff's Office. RP 215-217.

The Appellant was arrested and ultimately charged with two counts of Rape in the First Degree and one count of Domestic Violence Court Order Violation (Felony). Clerks Papers (CP) 132-134. Each crime alleged that is was committed against a family or household member and further, that the Appellant was armed with a deadly weapon other than a firearm. CP 132-134.

The Appellant waived jury and proceeded to bench trail. RP 105-433; CP 80. After the State had rested, the Appellant offered testimony of several witnesses who were not present during the

incident but observed Stacey shortly after the incident or spoke with her afterward, for the purpose of showing that the sexual intercourse was consensual and that she was not being truthful regarding these events. RP 314-433. At the conclusion of the bench trial, the court found him guilty as charged, including all special allegations and enhancement. RP 434-440; CP 182-187.

At sentencing, the trial court heard from the Appellant before pronouncing sentence. RP 469-479. The Appellant claimed various shortcomings in the evidence, asserting that the trial process did not allow the Appellant to show that sex with Stacey was consensual, and that State's case was entirely based upon Stacey's credibility which he stated was, "pretty lame." RP 475, 476. The Appellant claimed there was evidence which was not collected, such as video from the convenience store, which would have shown, based upon her demeanor, that the sex before was consensual. RP 476-477. The Appellant admitted that he had sex with Stacey on the night in question, but denied that she was scared during the encounter. RP 477.

The court sentencing the Appellant to three hundred nine months, finding that the two crimes of Rape in the First Degree were not the same criminal conduct and ordered the respective sentences to run consecutive in accordance with RCW 9.94A.589(1)(b). RP 480-481. CP 242-254. In so finding, the court stated:

> With respect to the low end, the standard range calculation, it's kind of a mixed bag for me. I don't believe that these were the same criminal conduct. The question is, is there an opportunity somewhere in the evolution of events for you to stop, reflect, and change course.

RP 480. After the Appellant attempted to interrupt, the court continued:

> At the point where she's crying, and she says, "Look, if you're going to do this, at least let me get off the floor." That to me sounds like an excellent opportunity to cease and desist at that point; say, "You know what? I'm not going to do this. You're right."

RP 480.

The Appellant has now filed an appeal in this matter, asserting ineffective assistance of counsel and alleging sentencing errors.

IV. DISCUSSION

In two separate briefs, the Appellant raises three issues. First he claims that trial counsel was ineffective for failing to raise a defense of diminished capacity. He further claims that the sentencing court abused its discretion by finding that his two convictions for Rape in the First Degree were not the same criminal conduct. Finally, he claims that this Court should remand the matter for the trial court to reconsider whether he has the future ability to pay certain legal financial obligations. Because the defense of diminished capacity was neither legally nor factually appropriate to the charges, because the Appellant's own claims were contrary to such defense, and

because counsel's decision to assail the credibility of the victim was appropriate trial strategy, trial counsel was not ineffective. Further, based upon the facts of this case, the sentencing court was within its discretion when it determined that the two separate acts of rape perpetrated against the victim herein were not the same criminal conduct. Finally, because the Appellant failed to object, and only a limited portion of the legal financial obligations imposed herein required consideration of the Appellant's ability to pay, this Court should decline to reach the issue pursuant to RAP 2.5.

1. THE APPELLANT WAS NOT DEPRIVED OF EFFECTIVE COUNSEL WHERE A DIMINISHED CAPACITY DEFENSE WAS NEITHER SUPPORTED BY THE FACTS NOR LEGALLY APPLICABLE TO THE CHARGES AND WHERE A GENERAL DENIAL WAS A REASONABLE TRIAL STRATEGY.

The Appellant first claims that counsel was ineffective for failing to raise a diminished capacity defense. Diminished capacity is a defense based upon an impairment to mental condition not amounting to insanity which prevents an offender from possessing the requisite mental state, or *mens rea* necessary to commit the crime charged. *See* State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). As stated in State v. Thomas, 123 Wn. App. 771, 98 P.3d 1258 (Div. I, 2004);

> Diminished capacity is a defense when either specific intent or knowledge is an element of the crime charged. If specific intent or knowledge is an element, evidence

> of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state.

Thomas, at 779.

A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant fails to establish either prong, it is fatal to an ineffective assistance of counsel claim. Strickland, 466 U.S. at 700. Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). A reviewing court should highly deferential to trial counsel's performance and must strongly presume that trial counsel acted reasonably. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Matters of legitimate trial strategy will not support a claim of deficient performance. *See* State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251, 1257 (1995). This Court should consider trial counsel's actions at the time of the decision, and not with the benefit of hindsight in mind. In re Pers. Restraint of Cross, 180 Wn.2d 664, 694, 327 P.3d 660, 679 (2014)(*"We evaluate the reasonableness of a particular action by examining the circumstances at the time of the*

act."). To rebut the strong presumption that counsel acted reasonably, the Appellant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. Grier, 171 Wn.2d at 33.

First and foremost, the Appellant's argument fails because legally, diminished capacity is not a defense to Rape in the First Degree or any other rape offense. As stated above, diminished capacity only applies where specific intent or knowledge is an element of the crime charged. *See* Thomas, *supra*. The elements required for Rape in the First Degree pursuant to RCW 9A.44.040(1)(a) are 1) that the defendant engaged in sexual intercourse with the victim; (2) That the sexual intercourse was by forcible compulsion; (3) That the defendant used or threatened to use a deadly weapon or what appeared to be a deadly weapon. *See* WPIC 40.02 (*elements concerning date and jurisdiction omitted in the interest of brevity*). "First degree rape contains no *mens rea* element." State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003)(*citing* RCW 9A.44.040). It is therefore a strict liability offense and as such, diminished capacity is not relevant. *See* State v. Swagerty, 60 Wn. App. 830, 833, 810 P.2d 1 (Div. II, 1991). Counsel cannot be considered ineffective for failure to pursue a defense which was not legally available. *See* State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961, 966 (2003).

The Appellant virtually concedes that the crime of rape has no *mens rea* element but then cites to State v. Walden, 69 Wn. App. 183, 874 P.2d 956 (Div. I, 1993). Brief of Appelant (Brief), p. 10-11. The Appellant intimates that Walden somehow stands for the proposition that there is a "culpable mental state" for the crime of rape. This is a less than candid citation to Walden as that case has nothing whatsoever to do with whether Rape in the First Degree has a *mens rea*. Rather it addressed the question of "objective intent" as it pertains to same criminal conduct. *Id.* at 187. The Appellant therefore cannot show that counsel's performance was deficient and his claim of ineffective assistance necessarily fails.

As a factual matter, it should further be noted that there was no evidence that the Appellant's ability to formulate intent to commit any crime was impaired to any significant degree. While there was evidence that the Appellant entertained beliefs concerning facts that had not occurred (i.e. that he, Stacey, and the children had been raped, doppelgangers in masks, etc.), there is no evidence whatsoever that this somehow impaired his ability to formulate intent. To the contrary, the evidence shows that his behavior throughout was goal oriented and primarily focused on controlling his estranged wife. Immediately after his savage attack, he demanded she take him to buy a cigar. RP 206. He the threatened to kill her if she told anyone.

RP 209. He then told her:

> You're going to do what I tell you. You're going to go to work like nothing happened tomorrow. By tomorrow at five o'clock you better stop the restraining order, you better stop the divorce. When I want money, I don't care if you have to buy diapers or pay bills, you're going to give me money. When I want to use your car, you're going to let me take it any time I want. When I want dinner it better be done the way I want it. And by tomorrow I want a sandwich. So you better have me a sandwich by five o'clock when you get off. And you're going to bring it over to me. You're going to -- give me sex any time I want. And I don't care if I just screwed somebody or whatever; when I want it you're going to give it to me how I want it."

RP 210. While perhaps entertaining bizarre beliefs, these beliefs had little to do with the motives behind the attack of his wife. The Appellant used his brutal rapes as a way to control Stacey. There was no evidence of mental impairment sufficient to excuse his conduct.

A mental defense was also contrary to the Appellant's stated defense. At the time of sentencing, the Appellant clarified, at several points, that sex with Stacey during the incident resulting in these charges was consensual, and that she was lying when she claimed to be scared. RP 475, 476. The Appellant's stated defense was therefore based upon a lack of victim credibility. RP 476. Trial counsel's accession to the to his client's wishes did not violate the Appellant's right to effective assistance. *See* In re Pers. Restraint of Benn, 134 Wn.2d 868, 894, 952 P.2d 116 (1998).

Finally, trial counsel's decision to assail the credibility of the victim, while ultimately unsuccessful, was reasonable. As stated above, legitimate trial strategy will not support a claim of deficient performance and the reviewing court cannot cloud its judgement with the benefit of hindsight. *See* McFarland, 127 Wn.2d at 336, Cross, 180 Wn.2d at 694. Here, counsel sought to impeach the victim concerning her claim of fear based upon the fact that she went to the house despite the protection order. Trial counsel further offered testimony concerning her demeanor shortly after the incident to show a lack of appearance of fear, and a lack of emotional reaction to what she claimed had just occurred. Where the Appellant didn't deny that the incident occurred (that they had intercourse) and only claimed that the intercourse was consensual, this was legitimate strategy.

A defense of diminished capacity would have, at best, clouded the nature of the defense's case, and at worst, contradicted his claim of consensual sex. To be effective as a defense, the Appellant would have needed to abandon consent as a defense and instead acknowledge that he violently raped his estranged wife, but argue the lack of intent. With the mountain of evidence to the contrary that showed his ability to form intent, this would have been a tremendously difficult task. Counsel's decision to pursue a credibility attack on the victim was reasonable under the circumstances and cannot support a claim of ineffective assistance of counsel.

2. THE TRIAL COURT WAS WITHIN ITS DISCRETION TO FIND THAT THE TWO SEPARATE CRIMES OF RAPE IN THE FIRST DEGREE WERE NOT THE SAME CRIMINAL CONDUCT.

Next, and in both briefs, the Appellant challenges the sentencing court's conclusion that his convictions for two counts of Rape in the First Degree should have been considered the same criminal conduct. He then claims the court erred in ordering these counts to be served consecutively. Pursuant to RCW 9.94A.589(1)(b), when an offender is sentenced to two serious violent offenses which arise from separate and distinct criminal conduct, those offenses must be served consecutively. Because the legislature has not defined the term "separate and distinct criminal conduct," the courts have applied the definition for "same criminal conduct found in RCW 9.94A.589(1)(a) to effectively define what does not constitute "separate and distinct" conduct. *See* State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). RCW 9.94A.589(1)(a) defines same criminal conduct as follows:

> "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

In the context of serious violent offenses, two or more crimes will be treated as separate and distinct unless those crimes were committed at the same time, in the same place, against the same victim, and

have the same criminal intent. *See* Tili, at 122. The absence of any one element precludes a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). In State v. Kloepper, 179 Wn. App. 343, 356, 317 P.3d 1088, (Div. III, 2014), the Court discussed the intent element of the "same criminal conduct":

> Offenses have the same criminal intent when, viewed objectively, the intent does not change from one offense to the next. "Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." Courts have also looked at whether one crime furthers the other or whether the offenses were part of a recognized plan or scheme.

179 Wn. App. at 357(*citations omitted*).

> In determining a defendant's offender score ... two or more current offenses ... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct.

State v. Farias Lopez, 142 Wn. App. 341, 351, 174 P.3d 1216 (Div. I, 2007).

> Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.

State v. Aldana Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). A sentencing court's determination of that two crimes are not same criminal conduct will not be reversed absent an abuse of discretion or misapplication of the law. *See* State v. Walden, 69 Wn. App. at 188.

In this case, the Appellant cannot demonstrate that the

sentencing court abused its discretion in light of the facts and the case law. Here, while the Appellant committed these vicious rapes in the same location and against the same victim, the duration of these attacks and the fact that his objective purposes changed precludes a finding of same criminal conduct. The attacks herein occurred over a three hour period. The Appellant forced the victim to perform fellatio, to the point of near gagging, not for sexual satisfaction, but to torture her and break her down. He then pushed her to the floor and vaginally raped her. When she didn't perform to his satisfaction, the Appellant stopped what he was doing, grabbed the machete, and threatened to cut her up and kill her. When she pleaded with him and complained that she was in pain on the floor, he let her get on the bed and began to vaginally rape her again. While the Appellant may be able to show that these offenses occurred in the same place and against the same victim, he fails to demonstrate that they were committed at the same time and involved the same intent.

The Appellant relies on State v. Tili, *supra*, and asserts that the sentencing court's determination is contrary thereto and that Tili mandates reversal. Tili is clearly distinguishable. In Tili, the defendant penetrated the victim anus and vagina, sequentially with his fingers and then inserted his penis into her vagina. 139 Wn.2d at 111. This attack occurred over a couple minutes before the defendant therein

was interrupted by police who responded to a "911" call placed by the victim immediately prior to the rape. *Id.*

Here again, the Appellant raped the victim both orally and vaginally. He orally raped her on the bed. He then pushed her onto the floor and vaginally raped her. Dissatisfied, he then threatened her with the machete, and only after she begged him did he allow her onto the bed where he again commences vaginally raping her. With no intent to minimize the trauma sustained by the victim in Tili, the Appellant's savage penetrations of Stacey's mouth and vagina were not short in duration but were prolonged and sustained attacks. The victim endured the Appellant's serial attacks for three hours as apposed to the couple minutes in Tili.

A case more on point is State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (Div. II, 1997), wherein the Count found that two rapes of the same victim were not the "same criminal conduct." Grantham, at 859. There, the defendant assaulted the victim to gain submissive compliance, and then anally raped her. *Id.* at 856. He then kicked her as she cowered, telling her to get up. *Id.* In response to her pleas to stop and take her home, the defendant made more threatening statements and then demanded that she perform oral sex on him. *Id.* He slammed her head against the wall and forced her to perform fellatio on him. *Id.* This case is substantially the same as the

case at bar. The only difference is that the Appellant forced Stacey to perform oral sex first. In Grantham, the Court rejected the defendant's claims regarding "same criminal conduct" and stated:

> Based on this evidence, the trial court could find that Grantham, upon completing the act of forced anal intercourse, ***had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act.*** The crimes were sequential, not simultaneous or continuous. The evidence also supports the trial court's conclusion that ***each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other***.

See Id.(*Emphasis added*). The Supreme Court in Tili implicitly agreed with the Grantham Court's analysis but sought to distinguish the Tili case from the facts in Grantham. Tili, 139 Wn.2d at 123-124. In distinguishing Tili from Grantham, the Tili Court noted that the multiple acts of penetration committed by the defendant therein occurred continuously and uninterrupted, over a span of just a couple minutes. Tili, at 124. The Tili Court, in distinguishing Grantham further noted:

> Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.

Id. at 123. The Court therein continued:

> Thus, Grantham was able to form a new criminal intent before his second criminal act because his crimes were sequential, not simultaneous or continuous.

Id. at 124. On these differences the Court noted:

> This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration.

Id. Here, like Grantham and unlike Tili, the Appellant had completed one rape and had ample time reflect and formulate the intent to commit another act of rape. His objective intents were not only separately formulated, but distinctively motivated. The Appellant failed to sustain his burden to demonstrate that his two separate, successive rapes of the victim herein were the "same criminal conduct" and he now fails to sustain his burden to demonstrate that the sentencing court abused its discretion when it found that these two offenses were separate and distinct. His claim should therefore be rejected and the trial court's decision should be affirmed.

3. THIS COURT SHOULD REFUSE TO REMAND FOR CONSIDERATION OF THE IMPOSITION OF FINANCIAL OBLIGATIONS WHERE NO OBJECTION WAS MADE BELOW TO THE IMPOSITION THEREOF AND ONLY TWO ASSESSMENTS REQUIRED SPECIFIC INQUIRY INTO ABILITY TO PAY.

As a final challenge, the Appellant asserts that the trial court erred in failing to consider his ability to pay before imposing legal financial obligations. In support of this argument, the Appellant cites State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). While the State concedes that the sentencing court did not inquire of the

Appellant prior to imposition, it is important to clarify the law in this area and the scope of its application. As a result, the State asks this Court to decline to consider the issue pursuant to RAP 2.5.

This court ordinarily will not review a claim of error raised for the first time on review unless one of three exceptions exist. RAP 2.5(a). One exception is if the claim is for a manifest error affecting a constitutional right. RAP 2.5(a)(3). The appellant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A "manifest" error is one that is "so obvious on the record that the error warrants appellate review." State v. O'Hara, 167 Wn.2d 91, 100,217 P.3d 756 (2009).

First, the Appellant did not object below to imposition of any of the legal financial obligations. Further, the error addressed in Blazina and raised herein is one of statutory, not constitutional magnitude. *See* RCW 10.01.160(3). *See also* Blazina, at 833. Therefore, this Court can, in its discretion, decline to consider this issue raised for the first time on appeal.

RCW 10.01.160(3) requires that, before the court imposes costs against an offender at sentencing, the court must consider the particular facts and circumstances of the offender and determine whether he or she will be able to pay. The court may only impose

costs if the court determines that the offender will be able to pay. *Id.*

The sentencing court herein imposed the following legal financial obligations: the five hundred dollar ($500.00) Crime Victim's Compensation Assessment (CVC), a two hundred dollar ($200.00) Criminal Filing Fee, one thousand six hundred thirty dollars ($1,630.00) for sheriff's service fees, seven hundred fifty dollar ($750.00) court appointed attorney fee, a one thousand dollar ($1,000.00) fine, one hundred dollar ($100.00) Domestic Violence Assessment, and a one hundred dollar ($100.00) DNA maintenance and collection fee. CP 243.

It should be noted that the only legal financial obligations imposed herein to which RCW 10.01.160(3) and Blazina would apply are the court appointed attorney fees and the sheriff's service fees as costs imposed. The CVC assessment, DNA fee and filing fees are mandatory, requiring no individual inquiry. *See* State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (Div. II, 2013). Concerning the Domestic Violence assessment, the statute merely states that the court "may" impose the penalty. *See* RCW 10.99.080(1). While courts are "encouraged" to consider input from the victim concerning whether to impose the penalty, the statute contains no mandatory language or prohibition against imposing this penalty in the absence of a finding of ability to pay. *See* RCW 10.99.080(5). Finally, with

regard to the imposition of a fine, this Court has already decided that a trial court may impose fines under RCW 9A.20.021 without inquiring into a defendant's ability to pay. *See* State v. Clark, 191 Wn. App. 369, 375-76, 362 P.3d 309 (Div. III, 2015).

With regard to the mandatory assessments, the Appellant urges this Court to find that such imposition violates substantive due process. However, that issue has been decided and the claim rejected by the courts. *See* State v. Seward, 196 Wn. App. 579, 586, 384 P.3d 620 (Div. II, 2016), *rev. denied* __ Wn.2d __, __ P.3d __, 2017 Wash. LEXIS 684 (June 28, 2017). Further, there are legislatively created safeguards already put in place to prevent imprisonment of indigent defendants for failure to pay. *See* State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). In any event, the Appellant failed to raise the issue below and without an adequate record to review, this Court should decline to reach the issue. *See* State v. Stoddard, 192 Wn. App. 222, 226, 366 P.3d 474 (Div. III, 2016).

As a result, the only challengeable costs under Blazina would be the court appointed attorney fees and the sheriff's service fees. While not insubstantial, based upon the age of the Appellant and the lack of any significant impairment to his ability to work, aside from his current incarceration status, this Court should decline to reach these

issues pursuant to RAP 2.5(a).

V. CONCLUSION

The Appellant's claim for ineffective assistance fails because, not only was it sound and legitimate legal strategy to assail the victim's credibility, his now claimed diminished capacity defense would not have been legally or factually applicable to the charges of Rape in the First Degree. The trial court was well within its discretion to find that the Appellant's two convictions for Rape in the First Degree were separate and distinct crimes for sentencing purposes, and therefore, consecutive sentences were appropriate as legally prescribed by statute. Finally, this Court should decline to reach the issue concerning imposition of legal financial obligations where application of the statutory requirement for a specific inquiry is limited to costs only, and is not required in imposing mandatory assessments or a punitive fine and where the Appellant failed to object at the time of sentencing. Finally, this Court should reject the Appellant's claim concerning the constitutionality of imposition of mandatory LFOs. This Court should therefore affirm the Appellant's convictions herein and the sentence imposed below. The State respectfully requests that this Court enter a decision affirming the Judgement and Sentence entered below and denying this appeal.

Dated this 11th day of July, 2017.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. ZACHARY J. BIGGS, Appellant.	Court of Appeals No: 337219 **DECLARATION OF SERVICE**

DECLARATION

On July 12, 2017 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

ROBERT M. SEINES
rseines@msn.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on July 12, 2017.

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ASOTIN COUNTY PROSECUTOR'S OFFICE

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